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No. 95-426

In the

Supreme Court of the United States

October Term, 1995

Carol Ruth Denney,

Petitioner,

vs.

The Regents of the University of California, et al.,

Respondents.

On Petition For Writ of Certiorari
To The California Court of Appeal
First Appellate District, Division Five

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Given the First Amendment interest in the free exchange of ideas, the reputational interests of public-figure plaintiffs, and the supposed potential for abuse of government power, are government officials who are sued for defamation by limited purpose public figures entitled to the protection of the "constitutional malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), which precludes liability for defamatory statements concerning a public figure unless they are made with knowledge of their falsity or reckless disregard of the truth?

LIST OF PARTIES

Petitioner's list of parties is correct except that, in addition to the parties listed, David Nadel was also an appellant in the California Court of Appeal, First Appellate District, Division Five, the court whose judgment is sought to be reviewed. S.Ct.R. 14.1(b).

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RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL PERTINENT STATUTORY PROVISIONS

In addition to the First Amendment of the United States Constitution, the following statutory provisions, which are set forth in pertinent part in the Appendix to this Brief, are discussed in the Petition and in this Brief in Opposition:

California Business and Professions Code Sections 335(b), (c)
California Civil Code Section 47(a)
California Civil Code Section 47(b)
California Civil Code Section 3294
California Government Code Section 815.2
California Government Code Section 820.2

COUNTERSTATEMENT OF THE CASE

Respondents here are the Regents of the University of California and four current and former University officials: University of California Berkeley Vice Chancellor Daniel Boggan, University of California Berkeley Director of Community Affairs Milton Fujii, University of California Berkeley Director of Public Information Jesus Mena, and Managing Counsel Christine Helwick (collectively "the University"). Petitioner was a leader of the highly visible and sometimes violent group that has opposed the University's and the City of Berkeley's plans to develop volleyball courts and other recreational improvements in People's Park, a 2.8 acre site south of the Berkeley campus. After the University officials made public statements explaining why the University obtained a temporary restraining order to stop petitioner and others from (1) vandalizing park property, (2) intimidating Park patrons and University employees, and (3) interfering with construction, petitioner and another group leader sued the University and the officials for defamation.

The trial court found that petitioner was a limited purpose public figure and, because she could offer no evidence that the supposed defamatory statements were published with constitutional malice, granted the University summary

judgment. (Pet. App. at 1-2[1]) The court also rejected petitioner's claim that the First Amendment applies only to governmental dissenters, not to the government or its officials like the University and the individual defendants here. (Pet. App. at 2-3) The Court of Appeal affirmed in a detailed opinion, the bulk of which discussed and then rejected petitioner's claim that governmental defamation defendants are not entitled to First Amendment protections. (Pet. App. at 4-37) The California Supreme Court unanimously denied review. (Pet. App. at 38)

The Court of Appeal's opinion correctly states the background facts [Pet. App. at 5-10], and the University adopts that statement as its own.[2]

REASONS FOR DENYING THE PETITION

A. The Lower Courts Are Not In Conflict Over Whether The First Amendment Applies To Governmental Speakers And That Issue Is Not Of Such Importance That This Court's Intervention Is Necessary[3]

Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), through *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974),

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[1] Throughout this Brief, the University uses the following abbreviations: "Pet." denotes the Petition for Certiorari; "Pet. App." denotes the Appendix to the Petition for Certiorari; "App." denotes the Appendix to this Brief in Opposition. Citations to the Court of Appeal's opinion here are to the pages in Petitioner's Appendix rather than to the published version at 28 Cal. App. 4th 1251 and 34 Cal. Rptr. 2d 188.

[2] Petitioner's statement of the case contains numerous supposed background facts that the record does not support. (Pet. at 2-3) The Court should disregard these unsupported statements.

[3] It is important to clarify the narrowness of the question that is before the Court. Despite petitioner's suggestion to the contrary

and most recently in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), this Court has held firmly to the view that to prevail in a defamation action, a public official or public figure must plead and prove "constitutional malice" — that the defendant made the challenged statement with knowledge that it was false or with reckless disregard for its falsity.[4] This rule promotes the unfettered exchange of ideas on which a democracy thrives and ensures that freedom of expression will enjoy the "'breathing space'" that it requires. *New York Times*, 376 U.S. at 269, 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Petitioner is unable to identify any conflict among the lower courts nor any lack of clarity over whether the *New York Times* standard applies to government defamation defendants. That is because there is none. Courts (including this one) have resoundingly rejected the notion that the value

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[Pet. at 11], there is no issue about whether the Court of Appeal correctly determined that petitioner was a limited purpose public figure. Petitioner did not seek review of that determination in the California Supreme Court, nor does she raise that issue in the "Questions Presented" section of her petition. (*See* Pet. at i). Similarly, petitioner does not seek review of whether she presented clear and convincing evidence of constitutional malice to create a triable factual issue necessary to defeat summary judgment. *See* S.Ct.R. 14.1(a). Finally, although petitioner alludes to the University's lawsuit against her and others [Pet. at 10], she raises no claim as to any issue arising from that action.

[4] The University uses the term "constitutional malice" to describe the *New York Times* standard and to distinguish it from common law malice or malice sometimes required by statute. *See Masson*, 501 U.S. at 510-11; *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974); *see also* Cal. Civ. Code § 3294 (c)(1) ("malice" finding required for punitive damages award).

of speech — and thus the availability of First Amendment defenses in defamation actions — depends on the speaker's identity or status. *E.g., First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source"); *Miller v. Nestande,* 192 Cal. App. 3d 191, 198 (1987) (applicability of *New York Times* constitutional malice standard does not depend on the media or non-media status of the defendant).

Indeed, Justice Brennan noted a decade ago that a majority of justices of this Court were in agreement that there is no distinction between the protections given media and non-media defendants under *New York Times. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 783-84 (1985) (diss. opn. of Brennan, J.). A majority of state and federal courts are in accord. *See* Annotation, *Defamation: Application Of New York Times And Related Standards To Non-Media Defendants,* 38 A.L.R. 4th 1114, 1119 (1985), and cases cited; *see also* Pet. App. at 15-16 and cases cited; *cf. Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 779 n.4 (1986) (leaving open applicability of burden of proof rule in defamation cases against non-media defendants).

In spite of this near unanimity, petitioner suggests that the question presented is worthy of review because only two lower court decisions [*Anderson v. Low Rent Housing Comm'n,* 304 N.W.2d 239, 247 (Iowa), *cert. denied,* 454 U.S. 1086 (1981), and *McDowell v. Paiewonsky,* 769 F.2d 942, 951 (3d. Cir. 1985)] have ever applied the constitutional malice standard to government defamation defendants. (Pet. at 13, n.8) This is untrue. Several lower courts (in addition to *Anderson* and *McDowell*) have ruled in favor of government defendants where public figure or public official plaintiffs failed to present sufficient evidence or allegations of constitutional mal-

ice.[5] In other cases, government defendants raised a constitutional malice defense but were held liable because the plaintiffs carried their burden of proving constitutional malice.[6] Indeed, even this Court has applied the constitutional malice standard in a case involving a government defendant, while expressly reserving the question whether the standard applies to an individual rather than a media defendant. *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 & n.16 (1979) (sci-

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[5] In *Anderson*, 304 N.W.2d at 245-47, the Iowa Supreme Court held that a former city employee who had sued a City commission and one commissioner for libel was a public figure who had to establish *New York Times* malice by clear and convincing evidence even though the defendants were "non-media." In *McDowell*, 769 F.2d at 949-51, the Third Circuit held that an architect who had sued a Virgin Islands leglislator for defamation was a public figure but that he had not proven constitutional malice. Many other decisions involving governmental defamation defendants have reached the same conclusions, applying the *New York Times* standard without hesitation. *E.g., Rattray v. City of National City*, 51 F.3d 793, 800-01 (9th Cir. 1994) (affirming order granting new trial where jury had awarded plaintiff police officer $300,000 in damages against city, police department, and police chief), *cert. denied*, --S. Ct.--, 1995 WL 380631 (1995); *Beard v. Baum*, 796 P.2d 1344, 1353-54 (Alaska 1990) (affirming summary judgment in favor of the State of Alaska and Alaska Department of Transportation officials, in action by a former Department employee); *Britton v. Koep*, 470 N.W.2d 518, 524-25 (Minn. 1991) (reversing Court of Appeal and reinstating summary judgment for a county and county commissioner, in action by a county probation officer); *Hirman v. Rogers*, 257 N.W.2d 563, 567 (Minn. 1977) (reversing denial of JNOV and reversing judgment in favor of two former police officers and one former deputy sheriff in action against sheriff and county); *Huyen v. Driscoll*, 479 N.W.2d 76, 79 (Minn. App. 1991); (affirming judgment for a city and a commissioner in action by a former director of city human rights department); *Waterson v. Cleveland State Univ.*, 639 N.E.2d 1236, 1239-40 (Ohio App. 1994) (affirming judgment in favor of a state university and against deputy chief of campus police); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667-68 (Ohio App. 1988) (affirming summary

entist who sued Senator Proxmire after receiving "Golden Fleece" award for waste in government was not a "public figure" required to prove constitutional malice).

While none of these cases expressly addressed the question presented here — whether government officials sued were entitled to rely on a constitutional malice defense — that is a reason to deny certiorari, not grant it. That the courts in these cases applied the defense to government officials without even blinking shows that they were not troubled with the concept of its applicability in this context. Here, while the Court of Appeal took pains to explain why it is appropriate for courts everywhere to apply the defense to government officials, its decision does not warrant this Court's attention unless it is wrong on the policy or the law. As the University explains below, plaintiff cannot show that it is. For that reason alone, this case presents no important federal question and the petition should be denied. S.Ct.R. 10.1(b) & (c).

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judgment against teacher in action against city school board and individual board member); *Sidor v. Public Disclosure Comm'n*, 607 P.2d 859, 863 (Wash. App. 1980) (affirming dismissal for failure to state a claim of plaintiff candidate's complaint against commission, individual commissioners, and state of Washington); *see also City Firefighers Union, Local 28 v. Duci*, 428 N.Y.S.2d 772, 775-76 (N.Y. Sup. 1976) (dismissing complaint in action by officials of firefighters' and patrolmen's unions against mayor on grounds that, among other things, plaintiffs were public figures who failed to allege malice).

[6] *E.g., Starkins v. Bateman*, 724 P.2d 1206, 1209-12 (Ariz. Ct. App. 1986) (affirming denial of JNOV and affirming jury verdict for former city fire department captain against firefighters and a city); *Blessum v. Howard County Bd. of Supervisors*, 295 N.W.2d 836, 842-44 (Iowa 1980) (affirming judgment in favor of plaintiff, a former county engineer, against county supervisor, where evidence of constitutional malice was sufficient to go to jury).

B. The Court Of Appeal Correctly Decided The Issue Presented

The Court of Appeal identified three competing interests implicated by petitioner's defamation claim against the University: (1) promoting government's contribution to the unfettered exchange of ideas, (2) the reputational interests of plaintiffs, and (3) the potential for government abuse of its power. (Pet. App. at 18) The Court of Appeal then weighed these interests and found that giving *New York Times* protection to governmental defendants like the University strikes an appropriate balance.[7] As we discuss, that decision was correct both in result and reason, and provides no basis for review.

1. The Court Of Appeal Considered The Reputational And First Amendment Interests At Issue And Correctly Held That Application Of The *New York Times* Standard Properly Balances Those Interests

Courts and commentators acknowledge that the government has a legitimate role to play in the "marketplace of ideas." *E.g., Miller v. California Comm'n on the Status of Women,* 151 Cal. App. 3d 693, 701 (Cal. Ct. App.)

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[7] The Court of Appeal was careful to note that its decision applies only to suits against government officials in their official capacities and consequently to the derivative liability of the government employer. (Pet. App. at 12-13; *see* Cal. Gov't Code § 815.2) Because all of the individual defendants here were acting in their official capacities when they made the challenged statements, this case does not involve whether *New York Times* protection should be given to a government employee acting outside the scope of an official capacity even if the employee lacks such protection when acting within that scope.

("`Government has legitimate interests in informing, in educating, and in persuading,'"quoting Steven Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 606 (1980)), *appeal dismissed*, 469 U.S. 806 (1984); Laurence H. Tribe, *American Constitutional Law*, at 807 (2d ed. 1988) (Government may "add its own voice to the many that it must tolerate, provided it does not drown out private communication"). That is not surprising, because government is often the sounding board for or the origin of many ideas that are being considered for adoption as policy.

The Court of Appeal here recognized government's valuable contribution to the unfettered exchange of ideas that is the hallmark of a democratic society. (Pet. App. at 18-22) Petitioner asserts, however, that the Court of Appeal gave too much weight to that interest while giving too little weight to the interest in protecting the reputations of plaintiffs from supposed governmental abuse of its power to defame. She suggests that a better balance would be achieved by holding government officials liable when they negligently defame public figures. She claims that such a rule is necessary because government speech is uniquely powerful and "vulnerable citizens" thus need a stricter standard than *New York Times* to protect them from the "excesses of government speech." (Pet. at 13-14, 18-19) But petitioner's argument proceeds from an unsound premise to an erroneous conclusion.

First, the notion that government speech is more powerful in its ability to influence the public than other speech is unproven and has even been the subject of criticism. Frederick Schauer, *Is Government Speech A Problem?*, 35 Stanford L. Rev. 373, 376-77, 382 (1983) (noting that social science literature regarding the effects of government speech on the populace is inconclusive). Indeed, as the Court of Appeal

recognized, because of general public dissatisfaction with and skepticism of government, the public may be "`strongly disposed to *disbelie[ve]*'" government speakers. (Pet. App. at 24, quoting Schauer, *supra*, at 381, emphasis added). Further, there is little reason to believe that government speech is particularly influential, given the pervasiveness of various communications media and the willingness of many to criticize the government. *See* Schauer, *supra*, at 380 ("The issues raised when the state is the *only* voice are significantly different from those raised when the state is one of many voices, especially when those voices are unrestrained both in law and in fact"). Indeed, the "big media's" voice may be just as powerful — if not more powerful — than government's. (Pet. App. at 24, citing Tribe, *supra*, at 809, n.16)

Petitioner's premise also presupposes that the public is easily duped into swallowing any ideology or point of view that the government dishes out. As last November's midterm elections make clear, the public is hardly that gullible. *See also* Schauer, *supra*, at 382 (there is "no reason to assume that the collective judgment [of the people] cannot appreciate government speech for what it is, in light of its source"). Yet it is precisely this paternalistic assumption about the public's ability to evaluate government speech on which petitioner's argument rests.

Even accepting (as the Court of Appeal did here [Pet. App. at 24]) that government may have unique powers of persuasion, it hardly follows that a governmental official should be liable for mere negligent false assertions about a public figure while all other defamation defendants who make such assertions enjoy *New York Times* protection. By her own account, petitioner is concerned not with the government's power but with its *abuse*. (See Pet. at 10-11, 14, 20) Yet that abuse is precisely what the *New York Times* standard

is designed to ferret out and punish, by requiring clear and convincing evidence that the defendant knew an allegedly defamatory statement was false or recklessly disregarded its truth. *New York Times*, 376 U.S. at 279-80.

The Court of Appeal recognized that the *New York Times* standard strikes a proper balance by adequately protecting the deliberately or recklessly defamed while at the same time ensuring vigorous public debate. (Pet. App. at 27-31) That Court was "acutely mindful of the danger that the government might abuse" its power and that the Court must "draw a line between government's legitimate expression of ideas and its abuse of the power to speak." (Pet. App. at 31-32) However, it reasoned that the "'drastic alternative of enjoining government and its officers from speaking out'" serves no one. (See Pet. App. at 31, quoting Mark G. Yudof, *When Government Speaks: Politics, Law and Government Expression in America*, at 286 (fn. omitted) (1983)). That is a sound conclusion which this Court need not revisit.

Indeed, no court that the University is aware of has adopted the drastic alternative that petitioner wants this Court to embrace. Nor does petitioner identify any potential "abuses" of government power — aside from deliberate or reckless falsehoods — that she believes a negligence standard would protect against. Petitioner complains of a "government-sponsored character assassination campaign." (Pet. at 20) But if petitioner had evidence to back up that complaint, that evidence could have subjected the University to liability under *New York Times*. Her problem is that she had none, either when she filed her lawsuit or when she was called upon during the summary judgment proceeding to produce it. And, if petitioner's real concern is with lawsuits such as the University's lawsuit against her [*see* Pet. at 10], surely there are other appropriate vehicles for dealing with

this supposed "misuse" of government power; a countersuit for defamation is not the answer. In short, no conceivable purpose would be served by petitioner's proposed rule.

Petitioner's apparent justification for denying government speakers *New York Times* protection is that the First Amendment was intended to protect the people from government, not the other way around. (See Pet. at 10, 21) The Court of Appeal recognized this "overarching principle" of constitutional theory, but found that applying *New York Times* to government defendants was consistent with competing First Amendment principles because doing so promotes government's contribution to the marketplace of ideas. (Pet. App. at 25-28, 31-32) The Court's primary concern was with protecting individual government employees rather than the governmental entity for which they work, particularly because the latter's liability is solely derivative. (Pet. App. at 28-29) Neither of these conclusions was erroneous and neither requires this Court's intervention.[8]

Moreover, petitioner's theory proves too much. If the purpose of the First Amendment is only to protect individuals from the government, then that principle should arguably apply to other provisions of the Bill of Rights, which the government should be barred from invoking. But the law is to the contrary. *See, e.g., Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1026-30 (9th Cir. 1984) (states have Seventh

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[8] Both petitioner and the Court of Appeal cite Justice Stewart's concurring opinion in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973), for the proposition that the First Amendment does not protect government. (Pet. at 21; Pet. App. at 26) *Columbia Broadcasting* was not a defamation case; rather, it concerned whether broadcasters could be forced to accept paid political advertising. The majority acknowledged that regulation of broadcast media "pose[s] unique and special problems not

Amendment right to jury trial in antitrust actions), *cert. denied*, 469 U.S. 1132 (1985); *California v. United States*, 395 F.2d 261, 263 (9th Cir. 1968) (state governments have Fifth Amendment right to just compensation for taking of property); *see also Singer v. United States*, 380 U.S. 24, 36 (1965) (Government has right to jury trial even if criminal defendant has waived it).[9]

The Court of Appeal correctly balanced the interests and properly held that the University is entitled to *New York Times* protection. Petitioner presents no compelling reason for this Court to revisit or question its decision.

2. None Of Petitioner's Remaining Arguments Has Merit

Petitioner attacks the Court of Appeal's opinion on a number of additional points. None of her contentions warrants this Court's plenary attention.

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present in the traditional free speech case." *Id.* Further, Justice Stewart qualified the broad statement in the text in a footnote, where he noted that "[g]overnment is not *restrained* by the First Amendment from controlling its own expression." *Id.* at 139, n.7 (emphasis added). That the government is free to censor itself does not mean that it may be forced to control its expression through imposition of liability for defamation.

[9] Petitioner points out this Court's statement that the equal protection and privileges and immunities clauses "protect people, not states." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); Pet. at 21. But that merely illustrates that the applicability of a particular constitutional protection to government entities should be determined on a case by case basis. Moreover, that unelaborated statement in a per curiam opinion does not mean that First Amendment protections are unavailable to government officials (who are also "people") or to the states when their liability is vicarious.

Petitioner first asserts that government officials do not need constitutional protection, as government's "informing" function is adequately protected by statutory and common law official duty privileges. (Pet. at 15-17) But as the Court of Appeal recognized, there is no inconsistency in giving government speakers the protection of these privileges *and* the *New York Times* defense. (*See* Pet. App. at 21-22, 24-25, 27)

Official duty privileges such as those in California Civil Code section 47(a) and the federal Constitution's Speech or Debate Clause [art. I § 6] generally give absolute protection from liability for a very narrow class of speech. *E.g., Hutchinson,* 443 U.S. at 130-33 (Senator's speech on Senate floor critical of scientist's research is protected by Speech or Debate Clause, but dissemination to public through press releases and newsletters is not); *Sanborn v. Chronicle Publishing Co.,* 18 Cal. 3d 406, 412-13, 415 (1976) (Cal. Civ. Code § 47(a) privilege protects only policymaking decisions, not their operational implementation, so that statement to press is not protected). Similarly, the privilege in California Government Code section 820.2 grants immunity for a narrow range of discretionary, policy-making functions. Its applicability in a defamation suit is similar — if not identical — to that of California Civil Code section 47(a). *Sanborn,* 18 Cal. 3d at 412-16; *see Susan A. v. County of Sonoma,* 2 Cal. App. 4th 88, 97 (1991); *Toney v. State,* 54 Cal. App. 3d 779, 792-93 (1976). In contrast, the *New York Times* standard gives only conditional protection to a very broad range of speech.[10]

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[10] California Civil Code section 47(b), which petitioner also cites as a potential source of statutory protection for government speech [Pet. at 16], makes privileged any publication or broadcast made in a legislative, judicial, or other official proceeding. Often called the "litigation privilege," the statute's purpose is to afford litigants and witnesses the utmost freedom of access to the courts.

Moreover, official duty privileges and the *New York Times* defense serve very different purposes. Official duty privileges enhance the effective administration of government, while the *New York Times* defense serves the broader First Amendment goal of encouraging the unfettered exchange of ideas. But that does not mean that government's only legitimate interest in a defamation action against it is the interest in effective administration and that only government speech that is protected by a statutory or constitutional "official duty" privilege deserves protection. (*See* Pet. at 16-17)

Indeed, many instances of legitimate government speech are not protected by an official duty privilege. This case is a prime example. The University made the challenged statements here to explain why it took the unusual step of seeking an injunction to halt destruction of property, intimidation and violence that was occurring over the construction of the People's Park volleyball courts. The public had a legitimate interest in hearing the University's side of the story, and the University had an equally legitimate interest — if not a duty — in giving the public a full explanation so it could evaluate the University's actions. Yet, denying *New York Times* protection to government actors would inhibit government from discharging its vital role of informing the public and participating in public debate — an activity that is

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Silberg v. Anderson, 50 Cal. 3d 205, 213 (1990). For judicial proceedings, the privilege applies where the statement is made: (1) in a judicial proceeding; (2) by litigants or other authorized participants; (3) to achieve the objects of the litigation; and (4) having some connection or logical relation to the action. *Id.* at 212. While the sweep of the privilege is broad, it does not include statements to the press by a participant in the litigation. *Shahvar v. Superior Court*, 25 Cal. App. 4th 653, 658-59 (1994); *Susan A.*, 2 Cal. App. 4th at 93-95.

legitimate but perhaps unprotected by an official duty privilege. The Court of Appeal recognized the "chilling effect" such a rule might have [Pet. App. at 20-21, 27-28], noting, for example, that the Director of the Department of Consumer Affairs might be inhibited from informing the public about consumer fraud due to the defrauding entity's threat of a defamation action. *See* Cal. Bus. & Prof. Code § 335(b), (c). Petitioner takes issue with that statement, contending that the Director would "certainly" enjoy the privilege of California Civil Code section 47(a). (Pet. at 17, n.11) But *Sanborn, Toney* and other official duty privilege cases [*see* discussion *supra*, at 14] suggest that while the *Director* might be protected for a "policymaking" decision to give information to the public, lower-level employees who implement that policy might not be.

Thus, the Court of Appeal was properly concerned with the inhibitory effects of defamation actions on the "information-disseminating" function of government. For example, if the University officials here were held to a mere negligence standard for explaining why they took legal action against petitioner and others, they might have declined to say anything, or at best may have made an extremely guarded explanation. That would not have satisfied the public's desire to know, nor would it have helped the public make an informed evaluation of the University's conduct on a well-publicized issue of public importance.[11]

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[11] To support her claim that the constitutional malice standard was never meant to protect government speakers, petitioner points to *New York Times's* language to the effect that heightened protection for speech about public figures is necessary to place non-governmental critics on equal footing with the officials they criticize. Such "equal footing" is necessary because governmental officials may invoke the official duty privilege as a defense. (Pet. at 17,

Petitioner next asserts that the "heightened vulnerability to government defamation of even a public figure plaintiff" requires a mere negligence rule for government defendants who speak in their official capacities. (Pet. at 18) She suggests that such a rule would help correct a perceived "credibility" problem that government has with the public and would promote accuracy in government speech and restore public confidence in government. (Pet. at 19) But petitioner never explains how exposing government entities to greater defamation liability would restore public confidence. To the contrary, a greater number of defamation verdicts against government defendants and the consequent drain on the public fisc would likely have the opposite effect.

Moreover, there is little evidence to suggest that use of the *New York Times* standard will encourage government officials to "bask in self-serving ignorance," as petitioner suggests. (Pet. at 19-20) Rather, as the Court of Appeal pointed out, the threat of *any* defamation liability is a sufficient check on the abuse of government power [Pet. App. at 27], and thus an adequate incentive toward accuracy in government speech. Further, government has additional built-in incen-

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n.11); *New York Times*, 376 U.S. at 282-83. But as the Court of Appeal here recognized, that "constitutional tit-for-tat" would be absent where, as here, the government defendant does *not* enjoy the protection of statutory privileges or immunities. (Pet. App. at 21) Moreover, requiring public *figures* to prove constitutional malice has nothing to do with the need to place non-governmental defamation *defendants* on equal footing with the government. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153-55 (1967). The public figure plaintiff — if he or she were the defendant — could not invoke an official duty privilege. *Id.* at 154. Rather, requiring such proof of public figures is necessary because, as individuals who attempt to influence the government, public figures' conduct warrants heightened scrutiny. *Id.* at 148.

tives to maintain accuracy in the information it disseminates — not the least of which is accountability at the ballot box.

Most importantly, petitioner forgets that the *New York Times* standard did not arise from a need to promote accuracy, but to encourage vigorous debate about public figures who, like petitioner, have thrust themselves to the forefront of a particular controversy. *Gertz*, 418 U.S. at 345, 351. As this Court has made clear, the *New York Times* defense applies in such cases because "'criticism of private citizens who seek to lead in the determination of . . . policy'" is as important to the public interest as criticism of government officials. *Id.* at 148 (quoting *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 196 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967)). That is because, like public officials, public figures "often play an influential role in ordering society," and "[t]he fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." *Id.* at 164 (Warren, C.J., concurring in the result). Accordingly, while petitioner's concerns about government credibility are laudable, requiring government defendants to pay damages in defamation suits by public figures is not the answer.[12]

Finally, petitioner asserts that if the Court of Appeal is concerned with the First Amendment rights of individual

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[12] Nor does application of the *New York Times* standard offend settled notions of "due process," as petitioner suggests. (Pet. 19, n.12) As the Court of Appeal found, petitioner's reliance on cases holding that governmental agencies must give a citizen notice and an opportunity to be heard before taking action that incidentally harms the citizen's reputation was misplaced. (*Id.*; Pet. App. at 29, n.4) After all, petitioner was not claiming that the harm to her rep-

government employees rather than those of government entities, then the answer is to apply the *New York Times* standard only when such officials speak as individuals rather than as representatives of the government. (Pet. at 20-22) Petitioner suggests that a government official need only announce that he or she is not speaking officially and that, under "traditional principles of agency law," the official would thereby be cloaked in the protection of the constitutional malice standard. (Pet. at 22) But even if this case presented the question of the standard to be applied when government employees speak in their individual capacities — which it does not [*see supra* at 8, n.7] — petitioner's standard is unwise and unworkable and would upset the delicate balance that this Court's First Amendment jurisprudence is designed to protect.

For one thing, the line petitioner wants the Court to draw between those governmental officials who may claim *New York Times* protection and those who may not is far too fuzzy. If petitioner is suggesting that not even low-level governmental employees are entitled to a *New York Times* defense when they speak in their official capacities, then one can imagine situations in which the First Amendment balance would be thrown totally off kilter. For example, should a Los Angeles County Superior Court deputy clerk be denied *New York Times* protection if Arnold Schwarzenegger sues the clerk for defamation after, in the performance of official

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utation sprung from any *administrative* action by the University. (Pet. App. at 29, n.4) Moreover, this Court has held that the interest in reputation *alone* is neither "liberty" nor "property" that the Due Process Clause protects. *Paul v. Davis*, 424 U.S. 693, 712 (1976) (distinguishing *Goss v. Lopez*, 419 U.S. 565 (1975), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), because they both involved deprivation of some other interest besides reputation).

duties, the clerk mistakenly tells a local newspaper that the star appeared in court on a drunk driving charge? Surely Mr. Schwarzenegger has sufficient access to the media to counter such a statement. *See Gertz*, 418 U.S. at 344. Yet, under petitioner's formulation, the court employee would be stripped of *New York Times* protection merely because he or she works for a public agency.

Moreover, a rule allowing a government speaker to invoke the constitutional protection merely by a talismanic incantation of the words "I'm only speaking for myself" borders on the absurd. Petitioner has not shown how the purported evils of government speech she identifies — such as government officials' supposedly superior power to persuade and defame — would be any lessened when the speaker purported to speak individually rather than for the government entity. Again, in this case, even if the University officials had prefaced their statements to the press with words such as "I'm only speaking for myself," it is doubtful that the supposedly harmful impact of the speech petitioner complains of would have been diminished.

Further, the determination whether a statement is made within the scope of a government official's employment — therefore subjecting the employer to vicarious liability — turns on many factors other than the employee's professed intent. *See, e.g., Sanborn*, 18 Cal. 3d at 411-12. The entire context of the statment must be examined, including an inquiry into whether it was made for the benefit of the employer. *Id.* If petitioner's aim is to deny *New York Times* protection to government entities, then it would seem anomalous to allow the employee to invoke the *New York Times* standard by chanting a magic phrase, as petitioner suggests, when that might not be enough to exonerate the government from vicarious liability for the statement.

If petitioner means to argue that the *New York Times* standard should apply only when the statements are not within the scope of employment and therefore the government is not vicariously liable, that would not resolve the problem of "relinquishment" of First Amendment rights by government employees that the Court of Appeal identified. (*See* Pet. App. at 27) Petitioner's formulation simply ignores the First Amendment values that are promoted when *New York Times* protection is accorded to official speech. (*See* discussion, *supra*, at 8-9, 15-16). Accordingly, petitioner's proposed rule would upset settled notions of defamation law, and this Court should decline to embrace it.

CONCLUSION

The First Amendment concern for protecting the dissemination of competing opinions is no less important when those opinions emanate from government officials. To hold that the government is not entitled to the benefit of the *New York Times* standard when it engages in public debate about a public figure's activities would thus undermine the notion that "speech can rebut speech" and "free debate of ideas will result in the wisest government policies." *Dennis v. United States*, 341 U.S. 494, 503 (1951).

The law is not in conflict nor, after this case, is it unsettled. The Court of Appeal's opinion is thoughtfully reasoned, makes good law, and implements sound public policy. The petition accordingly presents no important question of federal law requiring this Court's intervention, and should be denied.

DATED: November 7, 1995

Respectfully submitted,

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APPENDIX A

CALIFORNIA BUSINESS & PROFESSIONS CODE
CONSUMER AFFAIRS

Chapter 4

§ 335. Dissemination

The director shall disseminate to the public in such form and manner as he deems most appropriate information, statistics, and other data concerning the following:

(a) ----------

(b) Commercial and trade practices which are detrimental to consumers.

(c) Goods and services which are unsafe, unhealthful or inimical to the general welfare of consumers.

APPENDIX B

CALIFORNIA CIVIL CODE

§ 47. Privileged publication or broadcast

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this

paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

APPENDIX C

CALIFORNIA CIVIL CODE

§ 3294. Exemplary damages; when allowable; definitions

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) ----------

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintif or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

APPENDIX D

CALIFORNIA GOVERNMENT CODE

Public Entities and Employees

§ 815.2 Injuries by employee within scope of employment; immunity of employee

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

APPENDIX E

CALIFORNIA GOVERNMENT CODE

Public Entities and Employees

§ 820.2 Discretionary acts

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.